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II

110TH CONGRESS  
1ST SESSION

# S. 1951

To amend title XIX of the Social Security Act to ensure that individuals eligible for medical assistance under the Medicaid program continue to have access to prescription drugs, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

AUGUST 2, 2007

Mr. BAUCUS (for himself, Mrs. LINCOLN, Mr. SALAZAR, Mr. LIEBERMAN, Mr. ROBERTS, Mr. COCHRAN, Mr. SMITH, and Mr. LOTT) introduced the following bill; which was read twice and referred to the Committee on Finance

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## A BILL

To amend title XIX of the Social Security Act to ensure that individuals eligible for medical assistance under the Medicaid program continue to have access to prescription drugs, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Fair Medicaid Drug  
5 Payment Act of 2007”.

1 SEC. 2. PROVIDING ADEQUATE PHARMACY REIMBURSE-  
2 MENT UNDER MEDICAID.

3 (a) PHARMACY REIMBURSEMENT LIMITS.—

4 (1) IN GENERAL.—Section 1927(e) of the So-  
5 cial Security Act (42 U.S.C. 1396r-8(e)) is amend-  
6 ed—

7 (A) in paragraph (4), by striking “(or, ef-  
8 fective January 1, 2007, two or more)”; and

9 (B) by striking paragraph (5) and insert-  
10 ing the following:

11 “(5) USE OF AMP IN UPPER PAYMENT LIM-  
12 ITS.—The Secretary shall calculate the Federal  
13 upper reimbursement limit established under para-  
14 graph (4) as no less than 300 percent of the weight-  
15 ed average (determined on the basis of utilization) of  
16 the most recent average manufacturer prices for  
17 pharmaceutically and therapeutically equivalent mul-  
18 tiple source drug products that are available for pur-  
19 chase by retail community pharmacies on a nation-  
20 wide basis. The Secretary shall implement a smooth-  
21 ing process for average manufacturer prices to en-  
22 sure that Federal upper reimbursement limits do not  
23 vary significantly from month to month as a result  
24 of rebates, discounts, and other pricing practices.  
25 Such process shall be similar to the smoothing proc-

ess used in determining the average sales price of a drug or biological under section 1847A.”.

(2) DEFINITION OF AMP.—Section 1927(k)(1) of such Act (42 U.S.C. 1396r-8(k)(1)) is amended—

(A) in subparagraph (A), by striking “by” and all that follows through the period and inserting “by—

“(i) wholesalers for drugs distributed to retail community pharmacies; and

“(ii) retail community pharmacies that purchase drugs directly from the manufacturer.”; and

(B) in subparagraph (B)—

(i) in the subparagraph heading, by striking “EXTENDED TO WHOLESALERS” and inserting “AND OTHER PAYMENTS”; and

(ii) by striking “regard to” and all that follows through the period and inserting “regard to—

“(i) customary prompt pay discounts extended to wholesalers;

“(ii) bona fide service fees paid by manufacturers to wholesalers or retail

community pharmacies, including (but not limited to) distribution service fees, inventory management fees, product stocking allowances, and fees associated with administrative services agreements and patient care programs (such as medication compliance programs and patient education programs);

“(iii) reimbursement by manufacturers for recalled, damaged, expired, or otherwise unsalable returned goods, including (but not limited to) reimbursement for the cost of the goods and any reimbursement of costs associated with return goods handling and processing, reverse logistics, and drug destruction;

“(iv) payments received from, and rebates or discounts provided to, pharmacy benefit managers, managed care organizations, health maintenance organizations, insurers, hospitals, clinics, mail order pharmacies, long term care providers, manufacturers, or any other entity that does not conduct business primarily as a wholesaler or a retail community pharmacy;

1                   “(v) any payments made by manufac-  
 2                   turers that are associated with drugs dis-  
 3                   pensed by retail community pharmacies;  
 4                   and

5                   “(vi) any other discounts, rebates,  
 6                   payments, or other financial transactions  
 7                   that are not received by, paid by, or passed  
 8                   through to, retail community pharmacies.”.

9                   (3) DEFINITION OF MULTIPLE SOURCE  
 10                  DRUG.—Section 1927(k)(7)(A)(i) of such Act (42  
 11                  U.S.C. 1396r-8(k)(7)(A)(i)) is amended—

12                  (A) in the matter preceding subclause (I),  
 13                  by striking “there at least 1 other drug prod-  
 14                  uct” and inserting “there are at least 2 other  
 15                  drug products”; and

16                  (B) in subclauses (I), (II), and (III), by  
 17                  striking “is” each place it appears and inserting  
 18                  “are”.

19                  (4) DEFINITIONS OF RETAIL COMMUNITY PHAR-  
 20                  MACY; WHOLESALER.—Section 1927(k) of such Act  
 21                  (42 U.S.C. 1396r-8(k)) is amended by adding at the  
 22                  end the following new paragraphs:

23                  “(10) RETAIL COMMUNITY PHARMACY.—The  
 24                  term ‘retail community pharmacy’ means a tradi-  
 25                  tional independent pharmacy, traditional chain phar-

macy, a supermarket pharmacy, or a mass merchandiser pharmacy that is licensed as a pharmacy by a State and that dispenses medications to the general public at retail prices. Such term does not include a pharmacy that dispenses prescription medications to patients primarily through the mail, nursing home pharmacies, long-term care facility pharmacies, hospital pharmacies, clinics, charitable or not-for-profit pharmacies, government pharmacies, or pharmacy benefit managers.

“(11) WHOLESALER.—The term ‘wholesaler’ means a drug wholesaler that is licensed as a wholesaler by a State and that is engaged in wholesale distribution of prescription drugs to retail community pharmacies, including (but not limited to) manufacturers, repackers, own-label distributors, private-label distributors, jobbers, brokers, warehouses (including manufacturer’s and distributor’s warehouses, chain drug warehouses, and wholesale drug warehouses) independent wholesale drug traders, and retail pharmacies that conduct wholesale distributions.”.

(b) REQUIREMENTS OF PRIOR AUTHORIZATION PROGRAMS.—Section 1927(d)(5) of such Act (42 U.S.C. 1396r-8(d)(5)) is amended—

(1) in the matter preceding subparagraph (A), by striking “of the drug before its dispensing for any medically accepted indication (as defined in subsection (k)(6)) only if the system providing for such approval” and inserting “by the State of the use of the drug before its dispensing for any medically accepted indication (as defined in subsection (k)(6)). A State plan under this title shall, as a condition of coverage or payment for a covered outpatient drug for which Federal financial participation is available in accordance with this section, subject to prior authorization all covered outpatient drug products that are innovator multiple source drugs if such drug products are more expensive than other biologically and therapeutically equivalent drug products that are available for purchase in that State by retail community pharmacies. The system providing for such approval shall”;

(2) in each of subparagraphs (A) and (B), by striking “provides” and inserting “provide”;

(3) by redesignating subparagraphs (A) and (B) (as so amended) as subparagraphs (C) and (D), respectively; and

(4) by inserting before subparagraph (C) (as so redesignated), the following new subparagraphs:

1           “(A) require the prescriber to request prior  
 2           authorization by substantiating the medical ne-  
 3           cessity of dispensing the covered outpatient  
 4           drug as opposed to dispensing a substitute cov-  
 5           ered outpatient drug;

6           “(B) require that a prior authorization  
 7           number assigned to the approved request by the  
 8           State be included on the order for the covered  
 9           outpatient drug issued by the prescriber or re-  
 10          layed to the dispensing pharmacist by the pre-  
 11          scriber if the prescription is orally trans-  
 12          mitted;”.

13          (c) DISCLOSURE OF PRICE INFORMATION TO THE  
 14          PUBLIC.—Section 1927(b)(3) of such Act (42 U.S.C.  
 15          1396r-8(b)(3)) is amended—

16                 (1) in subparagraph (A)—

17                         (A) in clause (i), in the matter preceding  
 18                         subclause (I), by inserting “month of a” after  
 19                         “each”; and

20                         (B) in the last sentence, by striking “and  
 21                         shall,” and all that follows through the period;  
 22                         and

23                 (2) in subparagraph (D)—

24                         (A) in clause (iii), by inserting “and” after  
 25                         the comma;

1 (B) in clause (iv), by striking “, and” and  
2 inserting a period; and

3 (C) by striking clause (v).

4 (d) TECHNICAL AMENDMENT.—Section 1927(d)(1)  
5 of such Act (42 U.S.C. 1396r-8(d)(1)) is amended in the  
6 paragraph heading by inserting “AND MANDATORY” after  
7 “PERMISSIBLE”.

8 (e) EFFECTIVE DATE.—

9 (1) IN GENERAL.—Except as provided in para-  
10 graph (2), the amendments made by this section  
11 shall take effect as if included in the enactment of  
12 the Deficit Reduction Act of 2005 (Public Law 109-  
13 171).

14 (2) EXCEPTION.—The amendments made by  
15 subsection (b) shall take effect on the date that is  
16 180 days after the date of enactment of this Act.

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